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SHAAFIE SAIBI

v.

PP

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HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPEAL NO: 42-8-2005]
8 AUGUST 2007

C ***CRIMINAL LAW:*** *Penal Code - Section 376 - Rape - Whether there were two separate and distinct offences of rape alleged against the accused - Whether inter connected to justify a joint trial of the offences under s. 165(1) of the Criminal Procedure Code - Whether there should have been a joint trial or separate trials as envisaged under s. 163 of the* D *Criminal Procedure Code*

CRIMINAL LAW: *Sentence - Concurrent or consecutive - Whether trial judge failed to consider one transaction principle - Whether sentence manifestly excessive - Whether consecutive sentence set aside*

E The appellant was tried on two charges of rape under s. 376 Penal Code and was subsequently convicted on each charge. He was sentenced to twenty years on each of the charges, the sentences to run consecutively. The appellant appealed against the conviction and sentence. At the hearing of the appeal, the F appellant alleged that the conviction against the appellant was bad by reason of the two charges having been jointly tried and that the sentence meted out against the appellant were erroneous in principle and manifestly excessive. The issues that arose for consideration were (a) whether there should have been a joint G trial or separate trials as envisaged under s. 163 of the CPC and (b) whether the trial judge had correctly concluded that the two charges against the appellant were distinct charges which were not subsidiary to each other and warranted the meting out of consecutive sentences.

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Held:

(1) The two charges preferred against the appellant were each in respect of rape under the same section of the Penal Code. The victim in respect of each charge was the same, namely the I appellant's daughter, as was the location where the offences were perpetrated. The difference between the two charges was

the time of commission of the offences. The first charge was in respect of an offence in October 1992 while the second charge was in respect of an offence between 1992 and 1995. It was therefore evident that the two offences were inter-related in terms of the nature of the offence. (paras 4 & 5)

(2) Both charges would require the same witnesses giving evidence and the same ingredients were also proved. If two separate trials had been held, the accused could well have maintained that he was vexed with duplicate prosecutions which should have been undertaken in one trial. Although there were two separate and distinct offences of rape alleged against the accused, they were so inter-related or inter-connected as to justify a joint trial of the offences under s. 165(1) of the Criminal Procedure Code. Consequently there was no contravention of s. 163 of the Criminal Procedure Code as submitted by the appellant. This ground of appeal failed. (para 6)

(3) The sentence of 40 years imposed on the accused was manifestly excessive. He is 60 years old and even with a remission of his sentence he is unlikely to rejoin society after 26 years. The sentence imposed was a crushing sentence. Given the failure of the trial judge to consider both the one transaction principle and in view of the manifestly excessive nature of the sentence, this court allowed the appeal as to sentence only. (para 7)

[Setting aside the consecutive sentence imposed and order that the sentence imposed on the appellant for the two offences to run concurrently from the date of commencement of sentence.]

Case(s) referred to:

Amrita Lal Hazra & Ors v. Emperor AIR [1933] Lal 308 ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Banwarilal Jhunjhunwala and others and VA Thomson AIR 1963 Supreme Court 1620 ***(refd)***
Cheong Sik Kwan v. PP [1959] 25 MLJ 189 ***(refd)***
Chin Choy v. PP [1955] 21 MLJ 236 ***(refd)***
Chunnoo v. State AIR [1954] All 795 ***(refd)***
Dato' Hj Wasli Mohd Said v. PP and Anor Application [2006] 6 CLJ 1 HC ***(refd)***
Gun Kim Luu v. PP [1961] 1 MLJ 35 ***(refd)***
Jaafar Hussain v. PP [1950] 1 MLJ 154 ***(refd)***
Jayaraman & Ors v. PP [1979] 2 MLT 88 ***(refd)***

A *Lim Tian Chye v. PP FMSLR 228* ***(refd)***
Lim Yean Leong v. PP [1940] 1 MLJ 272 ***(refd)***
Mahendran Manikam v. PP [1997] 1 CLJ Supp 473 HC ***(refd)***
Ooi Sim Yin v. PP [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223 SC ***(refd)***
Peter Tham Wing Fai v. PP [1923] 2 MLJ 424 ***(refd)***
B *PP v. Loh Ang Sing [1965] 2 MLJ 129* ***(refd)***
PP v. Ridzuan Kok Abdullah [1996] 2 CLJ 346 HC ***(refd)***
PP v. Yap Huat Heng [1985] 2 MLJ 414 ***(refd)***
R v. Byrne 62 Cr App R 159 CA ***(refd)***
SA Jamil Md Yusof v. PP [2002] 7 CLJ 132 HC ***(refd)***
Seng Sai Kee v. Rex [1940] 9 MLJ 246 ***(dist)***
C *Subramania Ayyar v. Emperor ILR 25 Mad 61* ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 163, 164, 165(i), 166, 170
Dangerous Drugs Act 1952, s. 39B
Emergency Regulations 1948, regs. 4(1), 5(1)
D Penal Code, s. 376

Criminal Procedure Code [India], s. 218

Other source(s) referred to:
Mallal's Criminal Procedure Code, 6th edn, p 2865, paras 6051, 10478
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For the appellant - Ram Karpal Singh; M/s Karpal Singh & Co
For the prosecution/respondent - Tuan Azar Irwan; Attorney General's Chambers

Reported by Suhainah Wahiduddin
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JUDGMENT

Nallini Pathmanathan JC:

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[1] The appellant was tried on two charges as follows:

(i) Bahawa kamu, pada bulan Oktober 1992, jam lebih kurang 12.30 tengah hari, di sebuah bilik di rumah no. 3, Lorong 4/1B, Kampung Tasek Tambahan Ampang di dalam Daerah
H Hulu Langat, di dalam Negeri Selangor Darul Ehsan, telah merogol Suzanah binti Shaafie @ Mohammad K/P 790326-10-5400, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan,

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(ii) Bahawa kamu diantara tahun 1992 hingga 1995, di sebuah rumah no. 3, Lorong 4/1B, Kg Tasek Tambahan Ampang, di dalam Daerah Hulu Langat di dalam Negeri Selangor Darul Ehsan, telah merogol Suzanah binti Shaafie @ Mohammad KP 790326-10-5400, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan.

[2] He was convicted on each charge and was sentenced to twenty years on each of the charges, the sentences to run consecutively. He appealed against the conviction and sentence. At the hearing of the appeal, counsel for the appellant confined himself to two issues although several grounds are set out in the petition of appeal:

(a) He alleged that the conviction against the appellant is bad by reason of the two charges having been jointly tried. Such a wrong joinder of the two charges in one trial, it was Criminal Procedure Code ('CPC'), resulting in an illegality which cannot be cured;

(b) The sentences meted out against the appellant were erroneous in principle and manifestly excessive.

[3] Did The Joint Trial Of The Two Charges Preferred Against The Appellant Constitute An Illegality Thus Vitiating The Trial And Rendering The Conviction Bad?

3.1 The appellant contended that two separate and distinct offences had been preferred against him as above. As a consequence, by virtue of s. 163 CPC, each charge should have been tried separately unless these offences could fall within the exceptions to s. 163 CPC as set out in ss. 165 and 170 CPC. It was further submitted that the offences in the two charges did not fall within exceptions to s. 163 CPC as the disparity of time between the first and second offence was three years and as each offence of rape was separate and distinct and could not be construed as forming one transaction as envisaged in one of the exceptions to s. 163 CPC contained in s. 165(i) CPC. The trial judge had failed to address this issue of whether a joint trial of these two charges was proper at the outset of the trial. Such an issue could not be dealt with after the conclusion of the trial. The net result of the joint trial of these two charges was a breach/

A contravention of the express provisions as to the mode of trial prescribed by the CPC, resulting in an illegality. The conviction was therefore bad, and ought to be quashed with an order for a re-trial.

B 3.2 The respondent maintained that the joint trial of the charges fell squarely within the purview of the exceptions to s. 163 CPC, ie, under s. 165(i) CPC and accordingly was not illegal. Moreover no prejudice was occasioned to the appellant by the joint trial in respect of these two charges. Certainly no such C claim had been made by him at any time during the course of the trial.

[4] Analysis

Section 163 CPC

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4.1 In this case, two charges were preferred against the appellant, each in respect of an offence of rape at two different times. The sole difference between the charges was the issue of time, charge one referring to an offence of rape in October E 1992 and the second charge likewise to an offence of rape, but between October 1992 and 1995.

Section 163 CPC provides as follows:

> For every distinct offence of which any person is accused F there shall be a separate charge, and every such charge shall be tried separately, accept in the cases mentioned in sections 164, 165, 166 and 170.

In construing the language of the Criminal Procedure Code it has been said that:

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> ... The Code of Criminal Procedure contains a collection of statutory rules ... The language of the Code is, therefore, conclusive and must be construed according to ordinary principles, so as to give effect to the plain meaning of the H language used. No doubt in the case of an ambiguity that meaning must be preferred which is more in accord with justice and convenience, but in general the words used read in their context must prevail ... (see *Babulal Choukani v. Emperor* 39 Cr. LJ 1938)

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Bearing in mind the aforesaid, the section envisages that:

(i) For every distinct offence a person is accused of;

(ii) A separate charge has to be preferred; and

(iii) Each of those charges shall be the subject-matter of a different trial; except for

(iv) Those cases falling within ss. 164, 165, 166 and 170 CPC.

4.2 "Distinct" Offences

It follows that s. 163 CPC becomes applicable when a person has been accused of more than one "distinct" offence. *Woodroffe's Commentaries on Code of Criminal Procedure 1973* (Jubilee Edition) (Woodroffe') sets out the general principle in relation to s. 218 of the Indian Code of Criminal Procedure, which is similar to s. 163 CPC as follows:

> The present section lays *down the general rule that there must be separate charges for* ***distinct*** *offences. When two offences have been committed and they have no connection with each other, they are distinct offences within the meaning of this section.* A distinct offence is distinguished from another by its marks, such as, difference in time, place, the nature of the act, persons injured, difference in intention and penal section applicable. *... The principle is that whilst, speaking generally, distinct offences are to be separately tried, yet where there is a connecting link they may be tried jointly*. The object of requiring a separate charge for every distinct offence is that the accused should not be convicted for an offence of which he has not been specifically charged ... (emphasis added).

What then are "distinct" offences? This is defined further on in Woodroffe as follows:

> **Two offences would be distinct if they be not in any way interrelated. If there be some interrelation, there would be no distinctness** and it would depend on the circumstances of the case in which the offences were committed whether there be separate charges for those offences or not. **The expression "every distinct offence" must have a different context from the expressions "every offence" or "each offence".** A separate charge is required for every distinct offence and not necessarily for each separate offence.

4.3 *Mallal's Criminal Procedure Code* (6th edn) at p 2865, para 6051 states as follows in relation to "Distinct Offences":

> **When two or more offences are committed and they have no connection with one another, they are distinct offences.** The categories of distinct offences are however many. A distinct offence may be distinguished from another offence by one or more of the following characteristics:
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> (i) difference in time ie, commission on different occasions;
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> (ii) place;
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> (iii) persons aggrieved or injured;
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> (iv) Nature of acts constituting offences under different sections.
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> Thus the word 'distinct' stresses characteristics that distinguish. **Two offences would be distinct if they are not in any way inter-related.**

4.4 In *Banwarilal Jhunjhunwala and others and V.A. Thomson* AIR 1963 Supreme Court 1620 the Indian Supreme Court similarly held that the word "distinct" had to be accorded a specific meaning. It was held, *inter alia*:

> ... The expression 'every distinct offence' must have a different content from the expressions 'every offence' or 'each offence'. A separate charge is required for every distinct offence and not necessarily for each separate offence.
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> The question is, what is meant by 'every distinct offence'? 'Distinct' means 'not identical'. It stresses characteristics that distinguish while the word 'separate' would stress the 'two things not being the same.' Two offences would be distinct if they be not in any way inter-related. If there be some inter-relation, there would be no distinctness and it would depend on the circumstances of the case in which the offences were committed whether there be separate charges for those offences or not.
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> Such a view has been the basis of certain decisions by the High Courts and this Court ...

4.5 In *Chunnoo v. State* AIR [1954] All 795 Kidwai J said at p. 797:

> *The use of the word 'distinct' is of great significance and the Legislature having inserted it, we must, so far as possible, give it a meaning and not treat it as redundant. 'Every distinct offence cannot be treated as having the same meaning as 'every offence'.* The only meaning that the word 'distinct' can have in the context in which it occurs is to indicate that there should be no connection between the various acts which give rise to criminal liability. If there is such a connection, one action is not 'distinct' from other actions and each of them, even if it constitutes an offence does not constitute a 'distinct' offence.

Section 163 CPC provides that there should be separate charges for each distinct offence that a person is accused of. Likewise it provides that a separate trial should be held for each of these 'distinct' offences. If there is a misjoinder of charges, then any conviction secured as a consequence in a joint trial must be quashed as it would comprise an illegality. (see *Subrahmania Ayyar v. Emperor* ILR 25 Mad 61 and *Lim Yean Leong v. Public Prosecutor* [1940] 1 MLJ 272)

4.6 In the instant case, the two charges preferred against the appellant are each in respect of rape under the same section of the Penal Code. The victim in respect of each charge is the same, namely the appellant's daughter, as is the location where the offences were perpetrated. The difference between the two charges is the time of commission of the offences. The first charge is in respect of an offence in October 1992 while the second charge is in respect of an offence between 1992 and 1995. It is therefore evident that the two offences are inter-related in terms of the nature of the offence, the victim and the place of commission of the offence. In view of this inter-relationship does it follow that the offences are not 'distinct'? In other words, can it be said that because there is a degree of inter-relationship or inter-connection between the two offences, they are not 'distinct' as envisaged under s. 163 CPC?

4.7 In *Peter Tham Wing Fai v. Public Prosecutor* [1922] 2 MLJ 424, Chua J in dealing with the equivalent provisions of the Criminal Procedure Code in Singapore stated as follows:

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> ... Section 167 of the Criminal Procedure Code (The equivalent of s. 163 CPC) is a general provision which provides that there should be separate charges for distinct offences and that such charges should be tried separately and in certain circumstances jointly. It must be read with sections 168, 169, 171 and 175 (The equivalent of ss. 164, 165, 166 and 170 CPC) of the Criminal Procedure Code which specifically provides for situations where charges may be tried jointly in one trial.
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> It will be seen from sections 168 and 169 that offences, which though distinct in the sense that each is a completed offence, are nevertheless connected through their similarity to each other or by a continuity of purpose and design common to each offence or related to one another as cause and effect (section 169 and see Chunnoo ...). It would appear from sections 168 and 169 that *"distinct offences" may also be a "series of offences of the same or a similar character" or offences committed in the same transaction.* (emphasis added)

4.9 In the instant case there are two offences of the same or of a similar character. However, notwithstanding their similarity and inter-connection, they are still distinct, separate and composite offences under s. 376 of the Penal Code, as judicially interpreted by Chua J in *Peter Tham Wing Fai v. PP* (above).

4.10 Further support for this conclusion is also to be found in *Mahendran a/l Manikam v. Pendakwa Raya* [1997] 1 CLJ Supp 473, where KC Vohrah J (as he then was) stated, *inter alia*, that the offence of rape in law is one single act of unlawful sexual intercourse, and not a continuing offence:

> ... Under s. 163 CPC, for every distinct offence of which any person is accused, there shall be a separate charge. As was pointed out earlier, the offence of rape is not a continuing offence; the offence of rape is one single act of unlawful sexual intercourse. The prosecution's case related to two acts of unlawful sexual intercourse on two different dates and at two different places and clearly two different distinct offences and therefore two separate charges ought to have been framed against the appellant ... (emphasis added).

Accordingly in the instant case, where two separate allegations of rape were made against the appellant, two charges were preferred against him such that he knew with certainty the nature of each of the charges preferred against him. However the issue that then arises for consideration is whether, given the two distinct charges preferred against the appellant, there should have been a joint trial or separate trials as envisaged under s. 163 CPC.

[5] Exceptions To s. 163 CPC

5.1 Section 163 CPC stipulates that separate trials are required for each distinct charge that is preferred against an accused. The rule is intended to prevent embarrassment and difficulty to the accused in defending himself. However there are recognized exceptions to s. 163 CPC as set out in ss. 164, 165, 166 and 170 CPC. In the specific circumstances set out in these rules, an accused person may be tried in respect of more than one charge in the same trial. It falls to be considered whether in the instant case, the two charges of rape against the accused could be tried together in the same trial, under the exception provided in s. 165 CPC. The facts of this case do not fall within the other exceptions set out in the Criminal Procedure Code.

Section 165(1) CPC provides as follows: "If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence ..."

The section provides that more than one offence may be dealt with in one trial, provided that these offences arise from the same transaction. There is no limitation placed on the number of offences that can be tried. This in turn, necessitates the question of what is meant by the words "same transaction". This issue has been examined in a series of cases by the Courts in India which have been approved and adopted by the Courts in Malaysia.

5.2 In the early cases of *Cheong Sik Kwan v. Public Prosecutor* [1959] 25 MLJ 189, the Court of Appeal considered the issue of whether four offences of criminal breach of trust and three offences of falsification of accounts which were tried together

comprised an illegality which was incurable, thus rendering the conviction unsustainable. The court concluded that the whole series of operations on which the charges were based were in fact a single transaction with one settled purpose and as such fell within the purview of s. 165(1) CPC. Therefore there was no illegality in the joint trial of those charges. In so concluding the court held:

> ... The question of when a number of acts do or do not form the same transaction for the purposes of sections 235 and 239 of the Indian Criminal Procedure Code (our sections 165 and 170) has been considered by the Courts in India in a very large number of cases. It is not necessary to consider these cases here in detail because, apart from insisting on the presence of such elements as proximity of time and place, continuity of action and unity of purpose and design, they are all agreed that the question is a question of fact to be decided upon the circumstances of each individual case ...

5.3 And in *Gun Kim Luu v. Public Prosecutor* [1961] 1 MLJ 35 where the accused was tried in respect of nine charges relating to contravention of various sections of the Road Traffic Ordinance in one trial, the High Court exercising its appellate powers dismissed the objection taken in respect of the joinder of the nine charges (while dismissing the appeal for other reasons) and stated as follows:

> ... The principles to be applied have been enunciated clearly enough in *Cheong Sik Kwan v. Public Prosecutor* [1959] MLJ 189 and in the earlier decisions of another Court of Appeal in *Lim Yean Leong v. Public Prosecutor* [1940] MLJ 272 that the exceptions to section 163 of the Criminal Procedure Code, which are set out in sections 164, 165, 166 and 170, are cumulative and not mutually exclusive. Whether a joinder of several charges is permissible or not must, in the ultimate analysis, depend upon the circumstances of each individual case. In my view the appellants' technical objection on this point fails because all three charges in each case arose over one transaction and come within section 165(ii) ...

5.4 In *Chin Choy v. Public Prosecutor* [1955] 21 MLJ 236 the Court of Appeal had to decide whether an offence of consorting contrary to reg. 5(1) of the then Emergency Regulations 1948 could be tried together with an offence of possession contrary to reg. 4(1) of the same regulations. The

offences had taken place over a period of seven years. In concluding that such a joint trial was an illegality, the court stipulated that:

> ... The best test which has been laid down in considering this matter is contained in *Amrita Lal Hazra v. Emperor* 42 Cal 957 where the following passage occurs at page 983:
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> It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

This has since been adopted as the decisive test to determine whether a series of acts is so connected together that they may be construed as forming the "same transaction". It has been adopted and utilized in, *inter alia*, *Public Prosecutor v. Ridzuan Kok bin Abdullah* [1996] 2 CLJ 346, *Jayaraman & Ors v. Public Prosecutor* [1979] 2 MLJ 88 and *Jaafar bin Hussain v. Public Prosecutor* [1950] 1 MLJ 154.

5.5 In *PP v. Ridzuan Kok bin Abdullah* [1996] 2 CLJ 346 the accused had been charged with the offences of drug trafficking under s. 39B of the Dangerous Drugs Act 1952 ('DDA') and for being in possession of drugs under s. 6 DDA under two separate charges. An application was made for these two charges under separate provisions of the DDA to be jointly tried on the basis that the charges fell within the exception to s. 163 CPC in s. 165(i) CPC, namely that they were committed in a series of acts which were so closely connected as to form the same transaction. The defence objected on the grounds that the joinder of charges would occasion a miscarriage of justice. The court allowed the joint trial after considering whether the two acts were so connected as to form the same transaction. It was held as a guide that acts would form the same transaction if there is proximity of time, proximity of place, continuity of action and community of purpose or design between the two alleged offences following the test laid down in *Amrita Lal Hazra & Ors v. Emperor* AIR [1933] Cal 308.

5.6 Applying the test as set out in *Amrita Lal Hazra* to the instant facts of this case, the position is as follows:

(i) Proximity of time: The charges reflect that the offences were committed at different times, one in October 1992 and the other between 1992 and 1995. Therefore there is no proximity of time;

(ii) Unity or proximity of place: Both offences were committed in the same place namely where the accused and the victim resided, namely within their home;

(iii) Continuity of action: From the charges, the offences were different, but were perpetrated in the same place, by the same accused against the same victim consecutively over a period of several years. To that extent there would appear to be continuity of action.

(iv) Unity or community of purpose or design: The two separate charges are so related to one another in terms of the victim, the place and even the manner of commission of the offence as to point to a unity of purpose, namely to rape the victim. The offences are so closely related, their one difference being time of commission, as to warrant being construed as part and parcel of the same transaction. In so far as time is concerned, the offences were perpetrated one after the other, thereby demonstrating a continuity of commission.

Although there is no unity or proximity of time in the instant case, the test set out in *Amrita Lal Hazra* does not require that all four features be satisfied in order that it can be concluded that several distinct offences comprise a part of the same transaction. In short the four requirements in the test are mutually exclusive and not cumulative. Authority for this proposition is to be found in *SA Jamil Md Yusof v. Public Prosecutor* [2002] 7 CLJ 132, *Lim Tian Chye v. Public Prosecutor* FMSLR 228 and *Public Prosecutor v. Loh Ang Sing* [1965] 2 MLJ 129.

A further point worthy of consideration is that the same witnesses would have to be called for both offences. The joint trial therefore saved both time and costs and caused no prejudice to the appellant. No miscarriage of justice was occasioned by the joint trial of the two charges against the appellant.

[6] Case-Law

6.1 Counsel for the appellant, in his submissions cited several cases in maintaining that the joinder of the charges constituted an illegality. I now consider these remaining cases.

In *Seng Sai Kee v. Rex* [1940] 9 MLJ 246 the accused was charged with putting a person in fear of injury and also with committing theft of 12 lemonade bottles. It was held that the two offences were not of the same kind and were not connected in any way, and therefore the trial of the two 'distinct' offences simultaneously constituted an illegality. But that case is readily distinguishable from the present case where the two charges, although distinct in themselves, are so closely connected as to comprise the "same transaction".

6.2 Consideration was also urged to be given to the case of *Mahendran a/l Manikam* [1997] 1 CLJ Supp 473 where KC Vohrah J (as he then was) held that as the prosecution's case related to two acts of unlawful sexual intercourse on two different dates and at two different places, there were two distinct offences and therefore two separate charges ought to have been framed against the accused. In that case, the prosecution had only preferred one charge that was amended at the close of the prosecution's case by inserting a date which specified the last date on which the commission of rape could have been committed. In the course of so amending the charge, the trial judge mentioned that the accused had raped the girl twice during the relevant period. The accused was convicted on the amended charge. The accused was therefore prejudiced in that he had been called to make his defence in respect of two different acts of alleged rape on a single charge of rape.

The other more significant issue in *Mahendran*'s case was that there was a reasonable doubt as to whether the two acts of sexual intercourse took place while the complainant was below the age of 16 years. For the purposes of the application of *Mahendran*'s case, to the instant appeal however, what is material is the finding of the learned judge in *Mahendran*'s case that there were two acts of unlawful sexual intercourse on two different dates and at two different places and "... clearly two different distinct offences and therefore two separate

charges ought to have been framed against the appellant." But in the instant case, two charges were preferred against the appellant. As a consequence no prejudice was afforded as in the case of Mahendran. There was no duplicity of charges. The issue of a joint trial of distinct charges was not in issue in *Mahendran*'s case, as in the instant case.

6.3 In *Dato' Haji Wasli bin Mohd. Said v. PP and Anor Application* [2006] 6 CLJ 1 an application was made by the prosecution for the joint trial of two accused persons under s. 170 CPC. The charges against both the accused were separate and distinct and the only common or related factor was that there was a proximity of time and place. One of them was charged with participating in a decision to approve a sale of a substantive number of shares in a company for his own benefit; secondly he was accused of cheating the company. The other accused faced two charges of bribing the same company to approve the same sale to the buyer. On these facts, both accused maintained that there was no nexus to connect the charges under the limbs of continuity of action and unity of purpose and design. The learned judge agreed with them stating that it was doubtful that there was a unity of purpose or design.

The facts of the instant appeal are quite different in that the two charges relate to the one accused as compared to two accused persons. Morever, the offence in the instant case is in respect of similar offences under s. 376 PC, unlike *Dato' Wasli*'s case where the charges were substantively different and required proof of different ingredients. In the instant case the victim is the same, with the only difference being in terms of the time when they were perpetrated. As pointed out above, a continuity of purpose or design is demonstrated in the instant case which warrants it falling within the purview of s. 165(1) CPC.

6.4 In the instant appeal it is evident that both charges would require the same witnesses giving evidence. The same ingredients were also proved. If two separate trials had been held, the accused could well have maintained that he was vexed with duplicate prosecution which should have been undertaken in one trial. The fact that two charges were preferred against him meant that he was at all times fully

cognizant that two different acts of alleged rape were made against him, one in 1992 and the second between 1992 and 1995.

In summary, it appears that although there were two separate and distinct offences of rape alleged against the accused, they are so inter-related or inter-connected as to justify a joint trial of the offences under s. 165(1) CPC. Consequently, there was no contravention of s. 163 CPC as submitted by the appellant. This ground of appeal fails.

[7] Sentence – Trial Judge's Grounds Of Judgment

7.1 The trial judge imposed a sentence of imprisonment of twenty years for each offence to run consecutively, thereby totaling forty years for the two offences. She went to some lengths to explain the reason for handing down a sentence of twenty years for each of the offences of rape which were to run consecutively. She considered the public interest and concluded that in view of the rampancy of such offences and notwithstanding the harsh sentences that were handed down, particularly in recent times, offences of rape were far too frequent. The trial judge also took into account the enormous psychological and emotional trauma endured by the victim as a consequence of her own father's actions. It was therefore necessary, she concluded in the public interest, to pass a deterrent sentence. The appellant's plea in mitigation and the fact that it was the appellant's first offence was also considered.

7.2 The learned trial judge also considered that the appellant had committed two distinct offences and consequently the sentences of imprisonment for each offence should be ordered to run consecutively. In so doing she relied on *PP v. Yap Huat Heng* [1985] 2 MLJ 414 where it was held that where two or more distinct offences had been committed sentences of imprisonment should not be made to run concurrently. The trial judge went on to consider the Supreme Court decision in *Ooi Sim Yin v. PP* [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223 where the court held that "where one charge was a mere subsidiary of another charge, the sentence imposed should be concurrent unless there existed some reasonable grounds for directing otherwise". However on the instant facts, the trial

judge concluded that "... the two distinct offences were not subsidiary to each other, and there existed reasonable grounds for directing the sentence to run consecutively in view of the nature and gravity of the offences committed, compounded by the special circumstance of the case and the need to serve public interest."

7.3 Principle Applied In Sentencing

The issue that requires consideration is whether the trial judge correctly concluded that the two charges against the appellant were distinct charges which were not subsidiary to each other and warranted the meting out of consecutive sentences. The appellant's stance in arguing this appeal was that if indeed there was no misjoinder of the charges by reason of the offences falling within the purview of s. 165(1) CPC, then in like manner, the sentences for these two interconnected offences should also run concurrently, and not consecutively.

The conclusion I reached above is that the offences of which the appellant was accused comprise distinct offences, which nonetheless fall within the exception to s. 163 CPC in s. 165(1) CPC. As such these two offences are to be considered a part of the same transaction. What then is the position in law with regard to sentencing in respect of two offences which comprise a part of a single transaction?

7.4 In *Bachik Abdul Rahman v. Public Prosecutor* [2004] 2 CLJ 572 the Court of Appeal set out the guiding principles to be followed when deciding whether to impose a consecutive or concurrent sentence:

> ... In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by ***the one transaction rule*** *and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be 'concurrent' rather than consecutive (see R v. Saleem [1964] Crim LR 482; R v. Walsh [1965] Crim LR 248). For there to be one transaction four elements must be present that is to say, proximity of time, proximity of place continuity of action and continuity of purpose or design ..."* (see *Jayaraman & Ors. v. PP* [1979] 1 LNS

36; [1979] 2 MLJ 88; *Amrita Lal Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP* [1955] MLJ 236). The rule however is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v. PP* [1992] 1 ZLR 81 at p. 83:

> The English courts have recognized that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished; see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R [S] 417 and *R v. Skinner* 919860 8 Cr App R [S] 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticized as vague, it is necessarily in such terms in order that the sentences may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard ...

7.5 It follows therefore that the general principle is that where there is in effect one transaction, a concurrent sentence is handed down although there are exceptions which require consecutive sentences, so as to discourage specific types of criminal conduct. In the instant case the learned trial judge fell into error when she considered that the two offences were distinct, without giving any consideration to the issue that these offences were indeed inter-connected and therefore could be jointly tried as comprising "one transaction" under s. 165(1) CPC. This is because there was a failure to consider s. 163 CPC and the exceptions to it in ss. 164, 165, 166 and 170 CPC. The responsibility to consider whether a joint trial should be conducted lies with the court.

Regrettably, this issue was not given any consideration by the learned trial judge. This is because the one transaction rule was neither considered nor applied in the court below. There is nothing in the record of the court below to reflect that any such consideration was given to the appellant in respect of these offences. Instead the learned trial judge concluded that these two offences were distinct and that neither was a subsidiary of the other thereby precluding the consideration or application of the one transaction rule. While this rule is not absolute and there are exceptions where the nature of the offence requires a consecutive sentence to be passed, it cannot be denied that this issue was not adequately addressed, if at all, by the trial judge.

A 7.6 Further, in this case the learned trial judge was of the view that the maximum possible sentence available was appropriate. Her reason for so concluding was the heinous nature of this crime whereby the appellant satisfied his less than human and unmanageable lust by raping his own young daughter, not
B once but twice. Justifiably public interest and the trauma suffered by the child were paramount in the trial judge's mind. Did these factors warrant a departure from the one transaction principle? Again this is an issue that was not considered by the trial judge.

C

The court below should have had regard to the principles above. With regard to an appeal against sentence the law is trite that a High Court in exercising its appellate powers should not interfere with the sentence handed down unless
D the sentencing judge has erred as to the proper factual basis for sentence, or in appreciating the materials placed before him or has passed a sentence which is wrong in principle or has imposed a sentence which is manifestly excessive, (see para 10478 *Mallal's Criminal Procedure,* 6th edn). In the instant
E case the individual sentences passed failed to take into consideration the one transaction principle correctly, thereby occasioning an error.

7.7 Additionally, the imposition of the maximum sentence for each
F offence also resulted in a cumulative sentence which "... may offend the totality principle if the aggregate sentence is substantially above the normal level of sentence for the most serious of the individual offences involved, ..." (DA Thomas in *Principles of Sentencing*, 2nd edn).

G In this case the appellant does not have a record of previous sexual offences. The acts for which he is now being punished are monstrous acts given that he is the father of the victim. The suffering both physical and psychological, suffered by his daughter is immense and it is likely that she will carry the destructive and
H injurious effects of his acts with her for the rest of her life. The appellant deserves no compassion. Notwithstanding this however, the maximum sentence provided by law for an offence should normally be reserved for the most serious examples of the offence: *R v. Byrne* 62 Cr. App. R. 159, CA. What should be considered
I is the worst type of offence which comes before the court and the

court should then ask itself whether the particular case that is being dealt with comes within the broad band of that type. (See Archbold, *Criminal Pleading Evidence & Practice 1998*). In the instant case, the trial judge does not appear to have asked herself this question. The sentence of 40 years imposed on the accused is manifestly excessive. He is 60 years old and even with a remission of his sentence he is unlikely to rejoin society after 26 years. The sentence imposed is a crushing sentence. Given the failure of the trial judge to consider both the one transaction principle and in view of the manifestly excessive nature of the sentence, I allow the appeal as to sentence only, set aside the consecutive sentence imposed and order that the sentence imposed on the appellant for the two offences are to run concurrently from the date of commencement of sentence.